

FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: C. Scott Tocher, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Adoption Discussion of Amendments to Regulation 18450.4 –
Conforming Advertisement Disclosure Regulations with Commission Policy

Date: August 9, 2005

Executive Summary

Shortly before the recent November statewide election, the state's Republican and Democratic parties, along with the Orange County Republican Party, sued the FPPC in federal district court, alleging that the advertising disclosure provisions of the Political Reform Act ("Act")¹ that require on-publication identification of the two largest contributors of \$50,000 or more were unconstitutional. (*California Republican Party, California Democratic Party, et al., v. Fair Political Practices Commission, et al.*, No. Civ-S-04-2144, E.D. Cal.) The primary ground of the complaint is based on a 2004 Ninth Circuit opinion (*American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 ("Heller")), which struck down a Nevada statute that also required on-publication identification of donors.

In light of controlling appellate authority and the holding of the district court in the current litigation, the Commission adopted a resolution earlier in the year clarifying the Commission's enforcement policy with respect to Government Code sections 84503 and 84506 as they apply to general purpose committees. At the Commission's last meeting in July, the Commission approved of draft amendments to regulation 18450.4 to conform the regulation to Commission policy. That regulation was noticed with the Office of Administrative Law for adoption at the September meeting. No comments have been received. **Staff recommends the Commission formally adopt the amendments to regulation 18450.4, which are unchanged from the last meeting.**

I. DISCLOSURES REQUIRED.

Among other requirements, section 84504 outlines how a committee must identify itself in its name when advertising in support or opposition of a ballot measure. This

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

section adds to the requirements found in section 84503 by specifying that a committee identify itself with a name or phrase that “clearly identifies the economic or other special interest of its major donors of fifty thousand dollars (\$50,000) or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101.”

Thus far, in ballot measure advertising, these statutes require disclosure of the two highest contributors of \$50,000 or more, and committee identification including the economic or special interest of its major donors of \$50,000 or more. Section 84504 goes on to require that if the major donors of \$50,000 or more share a common employer, the identity of the employer shall also be disclosed in the advertising. The statute further requires that “[a]ny committee which supports or opposes a ballot measure, shall print or broadcast its name as provided in this section as part of any advertisement or *other paid public statement.*” (Emphasis added.)

Section 84504 reaches beyond the advertising arena by requiring that a committee name contain certain information “*in any reference to the committee required by law.*” The section specifies that this includes the committee’s statement of organization, filed pursuant to section 84101.

Section 84506 is the first section that seeks to govern both ballot measure advertising and candidate advertising. The common thread here is that this applies to broadcast or mass mailing advertisements, advocating the election or defeat of any candidate or ballot measure, funded by *independent expenditures*. This section adds yet another requirement to some advertising disclosures. If the expenditure for a broadcast or mass mailing advertisement is an independent expenditure, the committee shall disclosure on the advertisement, the name of the committee making the expenditure and the identities of the two persons making the largest contributions of \$50,000 or more to the committee.²

II. LITIGATION OF DISCLOSURE REQUIREMENTS.

As the Commission is aware, on October 12, 2004, the California Republican Party, the California Democratic Party, and the Orange County Republican Party filed a complaint in the federal district court seeking injunctive and declaratory relief from two “on-publication” provisions of the Act, sections 84503 and 84506, which require a committee paying for ballot measure advertisements to identify their two highest contributors of \$50,000 or more. On October 27, 2004, Judge Damrell granted plaintiffs’ motion for a preliminary injunction and enjoined the Commission from enforcing these provisions against political party committees registered with the Secretary of State as general purpose committees.

² Section 84508 can also be classified as a disclosure statute, although it really serves to limit the scope of the disclosure required under sections 84503 and 84506 to a committee name and its highest major contributor, if the advertisement is of a smaller scale, as specified in the section.

A key factor in determining whether to grant the preliminary injunction request is the likelihood of plaintiffs' success at trial. The court, in its decision, found that plaintiffs demonstrated "serious questions going to the merits of their claim" based on the *Heller* decision.³

III. 2005 COMMISSION RESOLUTION.

In light of controlling appellate authority and the holding of the district court in the party litigation, the Commission adopted a resolution in April of this year clarifying the Commission's enforcement policy with respect to Government Code sections 84503 and 84506 as they apply to general purpose committees. The resolution states that sections 84503 and 84506 are unlawful as applied to these committees.

IV. AMENDED REGULATION 18450.4.

While Commission policy regarding enforcement of sections 84503 and 84506 is clear from the resolution recently adopted addressing this issue, the taking of regulatory action to codify that policy makes the policy more visible to the regulated community and public at large. This will reduce possible confusion over the law and ensure that the Commission's regulations reflect current policy.

To that end, staff has identified regulation 18450.4 as the proper vehicle for amendment to reflect the Commission's current policy. Regulation 18450.4 addresses the contents of disclosure statements. As such, this regulation is the logical location for a simple amendment stating the scope of the disclosure requirements.

Attached as Exhibit A, staff has drafted a new subdivision (a) to the regulation to indicate that the disclosure requirements of sections 84503 and 84506, subdivision (a)(2), do not apply to general purpose committees. The remaining subdivisions are renumbered accordingly. Finally, a technical fix is made in renumbered subdivision (d) to clean up potentially confusing language and to ensure that the subdivision addresses "contributors" of identical amounts, as opposed to "contributions." Staff believes these amendments codify the Commission's policies consistent with the resolution adopted earlier this year and provide the necessary clarity to the advertising disclosure regulations. **The language is unchanged from the version approved by the Commission at the pre-notice meeting in July.**

At the pre-notice discussion a question was raised about the Commission's authority to amend the regulation, which would arguably expand the scope of the statute. Agencies, like courts, are informed by common rules of statutory construction when faced with the task of interpreting and applying the law. The courts have long recognized the principle that if the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be

³ A more detailed discussion of the *Heller* decision and the litigation involving the Commission may be found in the March 2005 and July 2005 Commission meeting staff memoranda addressing the adoption of the Commission resolution and pre-notice discussion of this regulation, respectively.

given that meaning, rather than another in conflict with the Constitution. (*See, e.g., San Francisco Unified School District v. Johnson* (1971) 3 Cal. 3d 937, 948.) Moreover, the Act itself prohibits the Commission from implementing a statute or regulation in a manner that abridges the First Amendment in an unconstitutional manner. (§ 83111.5.) In light of the Ninth Circuit ruling in *Heller* finding on-publication disclosure requirements violative of the First Amendment, and in light of the court's finding in the instant matter that the statutes in question are very likely unconstitutional as applied in the context of general purpose committees, staff believes the Commission is comfortably within the boundaries of statutory construction to comport its regulations with the dual realities of its earlier resolution and current case law.

V. RECOMMENDATION

Staff recommends that the Commission adopt amended regulation 18450.4 consistent with the draft attached hereto.

Exhibits:

- A. Draft Amended Regulation 18450.4.